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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The
Appellate Court Of Illinois, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where the jury was unable to reach a verdict on the offense of voluntary manslaughter and thus trial court declared a mistrial, is prosecution of petitioner on voluntary manslaughter charge barred on the basis of double jeopardy?

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OPINION BELOW

The opinion of the Illinois Appellate Court, Second District, is reported at *People v. Krogul*, 115 Ill. App. 3d 734, 450 N.E.2d 20 (2d Dist. 1983). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. §1254(3).

STATEMENT OF THE CASE

Petitioner was indicted by the Lake County, Illinois, Grand Jury on three counts of murder and one count of voluntary manslaughter. The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At the jury instruction conference, both the petitioner and the State tendered an instruction on voluntary manslaughter as a lesser included offense of murder. The jury was instructed on the offense of voluntary manslaughter and on the justifiable use of force or self-defense.

The jury returned a not guilty verdict for the offense of murder, and a judgment of acquittal was entered on that charge. However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State then sought to continue the prosecution for voluntary manslaughter. Petitioner filed a motion to dismiss the prosecution and claimed that further prosecution was barred on the basis of double jeopardy. The trial court denied the motion, and petitioner appealed. The Illinois appellate court affirmed the trial court's denial of the motion. *People v. Krogul*, 115 Ill. App. 3d 734, 450 N.E.2d 20 (2d Dist. 1983).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the petition for writ of certiorari to review the decision of the Illinois Appellate Court, Second District, insofar as petitioner does not raise a question of constitutional proportion that is worthy of review. In seeking a writ of certiorari in this cause, petitioner advances a single reason in support of issuance of the writ: Double jeopardy is violated when, following an acquittal on murder and a hung jury on voluntary manslaughter, the prosecution seeks to retry petitioner for voluntary manslaughter (Petition at 5). Respondent maintains further review of this case is unnecessary because the decision below does not depart from established precedent, both from this Court and Illinois appellate courts. The court below fully considered and correctly decided the question now presented for review. Respondent further maintains that it would not be prudent for this Court to grant certiorari in that the issue herein centers around facts peculiar to the case at bar, and would have limited impact on future litigants. Petitioner admits as much when he stated: "This case involves no novel legal question, merely a unique factual twist." (Petition at 9)

WHERE THE JURY WAS UNABLE TO REACH A VERDICT ON THE OFFENSE OF VOLUNTARY MANSLAUGHTER AND THUS TRIAL COURT DECLARED A MISTRIAL, PROSECUTION OF PETITIONER ON VOLUNTARY MANSLAUGHTER CHARGE WAS NOT BARRED ON THE BASIS OF DOUBLE JEOPARDY.

Petitioner was indicted by the Lake County, Illinois, Grand Jury on three counts of murder and one count of voluntary manslaughter. The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At the jury instruction conference, both the petitioner and the State tendered an instruction on voluntary manslaughter as a lesser included offense of murder. The jury was instructed on the offense of voluntary manslaughter and on the justifiable use of force or self-defense.

The jury returned a not guilty verdict for the offense of murder, and a judgment of acquittal was entered on that charge. However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State then sought to continue the prosecution for voluntary manslaughter. Petitioner filed a motion to dismiss the prosecution and claimed that a retrial on the voluntary manslaughter charge would constitute double jeopardy in light of his acquittal on the murder charge. The trial court denied the motion, and petitioner appealed. The Illinois appellate court affirmed the trial court's denial of the motion.

Petitioner, by way of this petition, claims that double jeopardy bars prosecution for the offense of voluntary manslaughter where a mistrial is declared as to that offense and petitioner has been acquitted of the offense of murder. This basis of petitioner's argument is that where he has been acquitted of the lesser included offense,

murder, retrial, is barred as to the greater offense of voluntary manslaughter. (Petition at 5). Respondent submits that petitioner's argument is without merit in that it is based upon misapplication of Illinois law.

It is well settled in Illinois that the offense of voluntary manslaughter is a lesser included offense of murder. *People v. Ellis*, 107 Ill. App. 3d 603, 437 N.E.2d 409 (2d Dist. 1982). Accordingly, one who is charged with the greater offense of murder may be convicted of the lesser included offense of voluntary manslaughter. *People v. Lewis*, 51 Ill. App. 3d 109, 366 N.E.2d 446 (1st Dist. 1977). Contrary to petitioner's argument, manslaughter is a lesser included offense of murder.

Although acquitting petitioner of the greater offense of murder, the jury was not silent as to the included offense of voluntary manslaughter. The jury did consider the charge, however, they were unable to reach a unanimous verdict as to guilt or innocence. Thus, a mistrial was declared as to the offense of voluntary manslaughter.

It is well established that a trial court may properly declare a mistrial and discharge a jury when it is apparent that the jury is unable to reach a verdict. *People v. Mays*, 23 Ill.2d 520, 179 N.E.2d 645 (1962). Where the trial court discharges the jury because of its failure to reach a verdict of either acquittal or conviction, the constitutional prohibition against double jeopardy does not bar a new trial. *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824).

Furthermore, the fact that the jury in petitioner's trial acquitted him of murder and hung on the voluntary manslaughter charge, thereby causing a mistrial as to the voluntary manslaughter charge and allowing the State to proceed on the unresolved charge, does not dictate a different result. The situation in the case at bar is analogous

to that where a defendant may be retried on a lesser offense, of which he was convicted at an initial trial, after that conviction was reversed on appeal; that result obtains even though the first trial resulted in a verdict of acquittal on a greater offense. *Prince v. Georgia*, 398 U.S. 323, 326-27 (1970). In *Prince* the defendant had been tried simultaneously on murder and manslaughter charges and had been convicted of the lesser offense. The defendant successfully appealed that conviction, and the judgment was reversed. In reversing a murder conviction obtained in a second trial on the ground that the acquittal on that charge in the first trial barred its reprosecution, this Court made clear that a retrial on the manslaughter charge was proper:

The continuing jeopardy principle necessarily is applicable to this case. Petitioner sought and obtained the reversal of his initial conviction for voluntary manslaughter by taking an appeal. Accordingly, no aspect of the bar on double jeopardy prevented his retrial for that crime.

Id.

Petitioner stands in a position identical to the defendant in *Prince*. It is clear that the concept of continuing jeopardy normally applies to a mistrial caused by a deadlocked jury. *United States v. Sanford*, 429 U.S. 14 (1976). Furthermore, an acquittal on a greater offense does not preclude a retrial on a lesser offense to which continuing jeopardy has attached where a mistrial is caused by a deadlocked jury. *United States v. Larkin*, 605 F.2d 1360, 1369 (5th Cir. 1979), *cert. denied*, 446 U.S. 939 (1980).

In the instant case, there is no question that the jury was deadlocked and could not reach a verdict on the voluntary manslaughter charge. Consequently, the declaration of a mistrial as to the offense was proper, and the

State is not barred from placing petitioner on trial for the offense of voluntary manslaughter. "The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be foresaken by the formulation or application of rigid rules" which petitioner seeks to have the Court adopt. *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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